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Supreme Court, U.S.
FILED

07-690 NOV 21 2007

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No. (1)

IN THE
Supreme Court of the United States

DUCHESNE CITY, ET AL.,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit decided this First Amendment case in tandem with *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir.), *reh'g en banc denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-___ (U.S. Nov. 20, 2007). The Tenth Circuit denied en banc rehearing in the present case, by an equally divided 6-6 vote, in an order issued jointly in both this case and in *Pleasant Grove*. App. H. The questions presented are:

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?

2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?

3. In the alternative, if this Court first grants review in *Pleasant Grove City v. Summum*, No. 07-___ (U.S. petition for cert. filed Nov. 20, 2007), should this Court hold the present petition pending disposition of *Pleasant Grove* and then grant certiorari, vacate the decision of the Tenth Circuit, and remand for further proceedings in light of *Pleasant Grove*?

PARTIES

In addition to petitioner Duchesne City, the following parties were defendants-appellees-cross-appellants in the Tenth Circuit and are petitioners here:

Clinton Park, Mayor

Yordys Nelson, Nancy Wager, Paul Tanner, Darwin McKee, and Jeannie Mecham, City Council Members

Respondent Summum was the plaintiff-appellant-cross-appellee in the Tenth Circuit.

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INTRODUCTION

This case, like the separate case of *Summum v. Pleasant Grove City*, 483 F.3d 1014 (10th Cir.), *reh'g en banc denied by an equally divided* court, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-___ (U.S. Nov. 20, 2007), was litigated in the shadow of two prior "Summum" cases decided by the Tenth Circuit. Those cases, *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), and *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), adopted the extraordinary rule that whenever a government accepts, erects, and displays a monument donated by a private entity, the government creates a speech forum for permanent monuments proffered by other private entities. Thus, in the Tenth Circuit, cities are forced either to refuse and dismantle all donated monuments, or else "brace themselves for an influx of clutter," App. 10h McConnell, J., dissenting from denial of rehearing en banc).

In the present case, the city sought to avoid this dilemma by disposing of the city's park property containing a donated monument, first by quitclaiming that plot to the local Lions Club, and then by selling the plot to members of the family who originally donated the monument. The Tenth Circuit held, as a matter of state law, that the former transaction was invalid and that the second transaction may be invalid as well. These rulings are significant precisely because the legal failure of the city to disassociate itself from the donated monument forces the city back into the federal constitutional dilemma -- either accept and display all donated permanent monuments or accept and display none -- created by the Tenth Circuit's

Summum precedents. Were those precedents to be overturned, the dilemma would disappear and with it, the legal need for the city here to dispose of the monument and its underlying plot of parkland.

The petitioners in the separate *Pleasant Grove* case seek the overruling, by this Court, of the flawed and burdensome rule of the *Summum* cases. In particular, the *Pleasant Grove* petitioners urge this Court to hold that an object owned, controlled, and displayed by the government -- be it a memorial in a park or a sculpture in a government plaza -- is **government** speech, not **private** speech, and hence there is no "speech forum for private monuments."

That portion of the Tenth Circuit's decision affirming summary judgment for Summum in the present case rests precisely upon the premise that a **government**-owned and -controlled monument in a **government** park creates a **public forum** for **private** monuments. App. 6a-8a, 10a, 13a, 17a-19a. A holding by this Court overruling that premise, either in the present case or in *Pleasant Grove,* would thus necessitate reversal of this portion of the Tenth Circuit's judgment. Moreover, overruling the *Summum* line of cases would lift the constitutional straitjacket -- imposed by the misguided *Summum* cases -- that otherwise would govern the remand proceedings under the remainder of the Tenth Circuit's decision (which reversed in part, vacated in part, and remanded). Petitioners therefore urge this Court to grant review and repudiate the Tenth Circuit's *Summum* line of cases. In the alternative -- should this Court first grant review in *Pleasant Grove* -- this Court should consider holding the present petition pending disposition of *Pleasant Grove* and then grant, vacate, and remand in

this case for further consideration in light of *Pleasant Grove*.

DECISIONS BELOW

All decisions in this case to date are entitled *Summum v. Duchesne City*. The panel opinion of the Tenth Circuit appears at 482 F.3d 1263 (10th Cir. 2007). App. A. The opinions accompanying the Tenth Circuit's denial of rehearing and rehearing en banc appear at 499 F.3d 1170 (10th Cir. 2007). App. H. The unamended decision of the district court granting summary judgment to Duchesne City in part and denying Summum's motions for summary judgment and for injunctive relief appears at 340 F. Supp. 2d 1223 (D. Utah 2004). The final, second amended version of that opinion is reproduced in the appendix. App. B. The remaining orders in this case are unpublished.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit issued its panel decision on April 17, 2007, and denied a timely petition for rehearing en banc on August 24, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, CITY ORDINANCES, AND CITY RESOLUTION

The text of the First and Fourteenth Amendments to the U.S. Constitution are set forth in Appendix I. The pertinent city ordinances and resolution are set

forth in Appendices J, K, and L.

STATEMENT OF THE CASE

1. Jurisdiction in District Court

The complaint in this case invoked 42 U.S.C. § 1983, and the district court had jurisdiction under 28 U.S.C. § 1343. The complaint also raised pendent state claims, invoking jurisdiction under 28 U.S.C. § 1367.

2. Facts Material to Consideration of the Questions

a. Roy Park, the Donated Monument, and the Quitclaim to the Lions Club

Petitioner Duchesne City is a municipality in Duchesne County, Utah. One of the municipal parks in Duchesne City is Roy Park.

In 1979, the Cole family (local residents) donated a Fraternal Order of Eagles-style[1] Ten Commandments monument to the city in memory of the deceased father of the family, Irvin Cole. That monument was erected in the northwest corner of Roy Park. (Other structures in Roy Park include a playground, benches, and a covered pavilion.)

In August of 2003, after the 1997 *Summum v. Callaghan*[2] decision was followed by the 2002 decision

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[1]The Cole family was involved with the Eagles, and the monument is essentially identical to the Eagles monuments at issue in various Establishment Clause cases, *e.g.*, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

[2]130 F.3d 906 (10th Cir. 1997).

in *Summum v. City of Ogden*,[3] both involving Utah municipalities sued by Summum to force them to install Summum's "Seven Aphorisms" monument, Duchesne City attempted to dispose of the property in Roy Park containing the monument the Cole family had donated to the city. After consulting informally with city council members and getting their assent, the mayor -- respondent Clinton Park -- executed a quitclaim deed transferring the small plot of land containing the monument to the local Lions Club, of which Mayor Park was also president.

b. Summum's Proposed Monument

Respondent Summum is a self-described "corporate sole and a church," founded in 1975, with its headquarters in Salt Lake City, Utah. Summum's founder, Summum Bonum Amon Ra, asserts that "Summa Individuals, Advanced Beings," appointed him founder and president of Summum. Answers to Defts' 1st Set of Interrogs. at 2.[4] In September and October 2003, Summum, through its president, wrote to petitioner Clinton Park, mayor of Duchesne City, requesting permission either to erect a monument in Roy Park or to be transferred a plot of land similar to that transferred to the Lions Club so as to erect Summum's monument. The Summum monument would contain the "Seven Aphorisms of Summum."

The city responded on October 27, 2003, with a

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[3]297 F.3d 995 (10th Cir. 2002).

[4]Summum identified, in the same discovery responses, the following websites (*inter alia*) as containing additional information about Summum: www.summum.us; www.summum.kids.us.

letter that Summum construed as a denial. Summum then brought suit.

c. The Quitclaim to the Cole Daughters

On June 16, 2004, while this case was in litigation, the Lions Club executed a quitclaim deed transferring the plot with the monument back to the city. On June 29, 2004, the city council then adopted two ordinances and a resolution. The first ordinance, No. 04-2 (App. J), established regulations governing the disposal of real property owned by the city. The second ordinance, No. 04-4 (App. K), "vacated" the park plot containing the monument and authorized the mayor to execute all pertinent documents. This ordinance also declared as follows:

> [T]he City never intended to, did not, and does not wish to open Roy Park or any portions thereof as a forum for the display of memorials, monuments or other donations from private individuals and organizations[.]

App. 1k. The resolution, No. 04-3 (App. L), then authorized the mayor to transfer the plot with the monument to three daughters of Irvin Cole (the Cole daughters), the man whose family had originally donated the monument to the city. The mayor then executed a quitclaim deed, dated July 13, 2004, selling the plot with the monument to the Cole daughters for $250 "and other considerations."

It is undisputed that the city, through its city council, has the power to determine which monuments (if any) will be permanently displayed on city park property. Respondent Summum does not assert that any private party has the authority to erect permanent

displays on city property. Summum does, however, dispute the validity of the quitclaim transfers both to the Lions Club and to the Cole daughters.

3. Course of Proceedings

a. District Court

Respondent Summum filed suit in the U.S. District Court for the District of Utah on November 26, 2003, against petitioners Duchesne City and its mayor and city council members. Summum alleged that the city's denial of Summum's request to erect its Seven Aphorisms monument in Roy Park, or to transfer to Summum a plot of land from that park for such a monument, violated the "free expression provision" of the First Amendment. Cplt. at 6-7, 11. The explicit basis for Summum's free speech claim was the duo of previous *Summum* decisions in the Tenth Circuit. Cplt. at 7, 10 (invoking *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002)). Summum did **not** make any claim under the Free Exercise or Establishment Clauses of the First Amendment. Summum sought damages (subsequently voluntarily capped at $20), declaratory relief, and an injunction ordering that the city "immediately allow plaintiff SUMMUM to erect its monument." Cplt. at 13-14.

Summum subsequently moved for a preliminary injunction, and all parties cross-moved for summary judgment. While the case was pending, the city, the Lions Club, and the Cole daughters, as described *supra* p. 6, took steps to regularize the city's disposal of the plot in Roy Park containing the monument.

The district court granted summary judgment (in part) to the city, denied summary judgment (in part) to Summum, and denied Summum's request for an injunction. App. B.[5] In essence, the court ruled that Duchesne's sale of the plot containing the monument to the Cole daughters successfully disassociated the city from any control over or ownership of the Ten Commandments monument. Given that there was no longer a basis to argue that the city was "sponsor[ing] private expression," App. 15b, the court rejected Summum's asserted prospective right to erect its own monument. The district court explained:

> Summum's request for its own monument to be displayed in Roy Park, either on city-owned land, or public property sold to it, would only perpetuate the City's entanglement with the sponsorship of private expression activities of private parties as defined in [*Summum v.*] *Callaghan* and [*Summum v.*] *City of Ogden*. Any solution of that nature would open the door to another display and then another, and so on, until the city park looks like a NASCAR driver at the Brickyard 400.

App. 15b. The district court did leave open, however, the possibility of awarding Summum damages for the violation of Summum's rights during the time period prior to the successful sale of the plot to the Cole daughters.

After additional briefing and a hearing, the district

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[5]The district court initially issued its written decision on October 18, 2004. (This is the version available on LEXIS.) After the parties pointed out some factual inaccuracies, the court issued an Amended Opinion and Order (Dec. 10, 2004) and a Second Amended Opinion and Order (May 20, 2005). The latter opinion is the one contained in Appendix B to this petition.

court granted summary judgment in part to Summum. App. C, D (oral ruling), E (written order). The court held that the city's attempted transfer of the plot with the monument to the Lions Club had not successfully disassociated the city from the monument, and that the city was therefore guilty of a "technical" violation of Summum's rights under the *Summum v. Callaghan* and *Summum v. City of Ogden* cases. App. 1e-2e. The court awarded Summum $20 in nominal damages. App. 2e.

The district court subsequently awarded Summum $694.40 in attorney fees. App. 5f.

Both sides filed appeals on both the merits and the attorney fees award.

b. Tenth Circuit Panel

A panel of the Tenth Circuit decided the parties' various appeals together.

On the First Amendment issue, the panel held that, under forum analysis, the relevant forum consisted of "permanent displays in Roy Park," App. 7a. The panel ruled that "it is this physical setting that defines the character of the forum," and in this case that setting was a park, "a traditional public forum." *Id.* The panel rejected the notion that the type of communication -- erecting permanent monuments -- affected the nature of the forum as "public": "The fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant to defining the forum, but it does not determine the **nature** of that forum." App. 7a n.1 (emphasis in original) (citing, *inter alia*, *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th

Cir. 2007)).

The panel then turned to the question "whether the small plot of land with the Ten Commandments monument remains part of the public forum (i.e., the city park) despite the city's efforts to sell it to a private party." App. 9a. The panel declared that the "first step . . . should be to resolve conclusively whether the property at issue is in fact privately owned," App. 12a, because "whether the property is private or public significantly affects the analysis of the property's forum status," App. 13a. In particular, "[i]f the land transfers in this case are invalid, the Ten Commandments monument is located on public property in a city park and is therefore clearly located within a public forum." *Id.* Such a conclusion would virtually assure, in the Tenth Circuit's view, that Summum would have a federal free speech right to erect its monument in Roy Park:

> In public forums, content-based exclusions (e.g., excluding Summum's Seven Aphorisms while allowing the Ten Commandments) are subject to strict scrutiny and will survive only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.

App. 8a (internal quotation marks, citation, and footnote omitted).

Turning to the question whether the city's attempts to dispose of the monument plot were valid, the panel first held that the attempted transfer to the Lions Club "was clearly invalid under state law," App. 15a. The panel therefore applied strict scrutiny, App. 17a, and found no compelling interest supporting the city's refusal to erect Summum's Seven Aphorisms

monument, App. 17a-18a. "Indeed, we have held that similar restrictions on speech may violate the First Amendment even under the less exacting standard of review applied to speech restrictions in nonpublic forums." App. 18a-19a (footnote omitted) (citing *Summum v. City of Ogden* and *Summum v. Callaghan*). "[W]e therefore conclude that Summum's free speech rights were violated prior to the property's transfer to the Cole daughters and affirm the District Court's grant of summary judgment in favor of Summum on this issue." App. 19a (footnote omitted).

The Tenth Circuit panel ruled that it could not, however, determine the validity, under state law, of the city's transfer of the plot to the Cole daughters. "[A] genuine issue of material fact exists concerning the validity of the City's transfer." App. 21a. The panel therefore reversed the district court's grant of summary judgment as to Summum's request for prospective relief and remanded for further proceedings. App. 14a, 21a, 24a.

The panel also vacated the award of attorney fees, explaining that the district court could recalculate the fee award after further proceedings on remand. App. 23a.

c. Tenth Circuit En Banc Petition and Denial

The city petitioned for rehearing en banc. The city noted that the defendants in the *Pleasant Grove* case, decided the same day and by the same Tenth Circuit panel as the present case, were simultaneously petitioning for en banc rehearing.

The city emphasized that the panel's holding that the "physical setting . . . defines the character of the

forum," App. 7a, was in direct conflict with Supreme Court cases holding that "[f]orum analysis is **not** completed merely by identifying the government property at issue," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (emphasis added), and that "[t]he mere physical characteristics of this property cannot dictate forum analysis," *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality).

On August 24, 2007, the Tenth Circuit denied en banc rehearing in both the present case and in *Pleasant Grove*, in a consolidated order, by an equally divided 6-6 vote.[6] App. H. Two judges wrote dissenting opinions, while the author of the original panel decision wrote a response to the dissents.

Judge McConnell, joined by Judge Gorsuch, faulted the panel's legal reasoning and lamented the harmful consequences of the panel decision for government-run parks:

> [The panel] hold[s] that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests. . . . This means that Central Park in New York, which contains the

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[6]Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes voted for rehearing en banc. Chief Judge Tacha and Judges Kelly, Henry, Briscoe, Murphy, and Hartz voted to deny en banc review.

> privately donated Alice in Wonderland statu[]e, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

App. 10h.

> A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

App. 11h.

Judge McConnell explained that the traditional public forum status of a park does **not** mean that "city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." App. 11h. Noting that the city did not "invite private citizens to erect monuments of their own choosing in these parks," Judge McConnell reasoned that "[i]t follows that any messages conveyed by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expression." App 11h-12h. Indeed, because the city "owned" and "exercised total 'control' over the monuments," Judge McConnell explained, the city "could have removed them, destroyed them, modified them, remade them, or . . . sold them at any time. Indeed, the City of Duchesne attempted to do

just that -- sell the monument along with the plot of land on which it sits." App. 14h (citation and footnote omitted).

"Once we recognize that the monuments constitute government speech," Judge McConnell continued, "it becomes clear that the panel's forum analysis is misguided." App. 15h. "The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as . . . the Establishment Clause," Judge McConnell observed. App. 16h. "[J]ust because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing." *Id.*

Judge McConnell concluded that the panel decision is "incorrect as a matter of doctrine and troublesome as a matter of practice." App. 17h. "[T]he error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decision[] should be corrected." *Id.*

Judge Lucero, in a separate dissent, explained that a park, while a traditional public forum for many purposes, is **not** a public forum for the placement of monuments. App. 5h-7h. Judge Lucero protested that the original panel "has given an unnatural reading to the traditional public forum doctrine [which] binds the hands of local governments as they shape the permanent character of their public spaces." App. 9h. He concluded:

> The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions

> will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

Id.

Chief Judge Tacha, author of the original panel decision, took the "unprecedented step of responding to the dissents" in her own separate opinion. App. 18h. She rejected the significance of any distinction between "transitory and permanent expression" (e.g., leaflets vs. monuments) "for purposes of forum analysis," *id.*; nor, for her, did the "type of speech" (e.g., leaflets vs. monuments) matter, App. 18h-19h. Indeed, Chief Judge Tacha insisted, "the only question properly before the panel" was whether the city "could constitutionally **discriminate**" against other private speakers. App. 19h n.1 (emphasis in original). She specifically rejected the contention that this was a "government speech" case: "the appropriate inquiry is whether the government controls the content of the speech at issue, that is whether the message is a government-crafted message." App. 22h. Here, because the city had not itself prescribed the messages on the Ten Commandments monument, the city's acceptance, ownership, and control of this monument did not suffice, in her view, to make the city the speaker in the selection and placement of permanent monuments. App. 20h-22h. Finally, Chief Judge Tacha voiced concern at the prospect that a government could adopt a message on a monument without any political accountability. App. 23h, 25h-27h. She did not explain, however, why the city council in this case (or any other case) would not be as politically accountable for its acceptance and placement of a donated monument as it would be for any other city actions.

d. Tenth Circuit Mandate Stayed

On August 29, 2007, the city moved to stay the Tenth Circuit's mandate pending a petition for a writ of certiorari. On September 5, 2007, the Tenth Circuit panel stayed its mandate. App. G.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit in the present case represents yet another misstep in that circuit's faulty line of *Summum* cases. *See Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum v. Pleasant Grove City*, 483 F.3d 1014 (10th Cir.), *reh'g en banc denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-___ (U.S. Nov. 20, 2007). In each case in this series, the Tenth Circuit embraced a fundamentally flawed First Amendment analysis. First, the Tenth Circuit ruled that a message-bearing monument donated to a municipality somehow remains the private speech of the donor, not government speech, despite the government's ownership and control of the placement and retention of the monument. *Summum v. Callaghan*, 130 F.3d at 919 & n.19; *Summum v. City of Ogden*, 297 F.3d at 1003-06; *Summum v. Pleasant Grove City*, 483 F.3d at 1047 n.2. *See* App. 18a-19a. The Tenth Circuit held that this "private" speech then opens a forum for other private speech in the form of monuments proffered by other private entities. *Summum v. Callaghan*, 130 F.3d at 919 & n.19; *Summum v. City of Ogden*, 297 F.3d at 1001-02; *Summum v. Pleasant Grove City*, 483 F.3d at 1050.

See App. 8a, 17a. Further compounding its error, the Tenth Circuit held that the nature of the forum -- public vs. nonpublic -- is determined by the nature of the **underlying physical property** (e.g., a public forum park), not by the fact that a private speaker seeks access only to **install a permanent monument**. App. 7a & n.1; *Summum v. Pleasant Grove City*, 483 F.3d at 1051.

As explained in the petition for certiorari in *Pleasant Grove*, the Tenth Circuit's aberrant analysis creates multiple circuit conflicts and also runs contrary to this Court's First Amendment cases. *See* Pet. for Cert., *Pleasant Grove City v. Summum*, No. 07-___ (U.S. filed Nov. 20, 2007) § I (identifying conflict between Tenth Circuit and Second, Third, Seventh, Eighth, and D.C. Circuits on question whether government-owned, government-controlled display on government property is **government** speech, not the private speech of the display's creator; identifying conflict between Tenth Circuit and Second, Sixth, and Seventh Circuits on question whether municipal parks are public fora for private monuments or other displays); *id.* § II (describing conflict between Tenth Circuit's *Summum* precedents and this Court's jurisprudence regarding government speech doctrine and public forum doctrine). Moreover, the upshot of the flawed *Summum* analysis is the imposition of unwarranted and unreasonable burdens upon government entities (local, state, and federal). As the dissenters lamented below, the "panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them." App. 9h (Lucero, J., dissenting). "Every park in the country

that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter." App. 10h (McConnell, J., dissenting).

In the present case, the faulty line of *Summum* cases dominated Summum's complaint, the rulings of the district court, and the decision of the Tenth Circuit panel. The city tried, both before and after the onset of Summum's litigation, to dispose of the plot and monument that, under the *Summum* cases, made the city a litigation target. The Tenth Circuit panel in this case invalidated the city's first effort and called into question the city's second effort, thus pushing the city back into the dilemma those *Summum* cases create, namely, either reject all donated monuments or accept them all.

This dilemma -- and with it, the Tenth Circuit's judgment affirming summary judgment for Summum on its federal free speech claim -- disappears if the *Summum* line of cases is overturned. That is precisely what the petitioners in *Pleasant Grove* and in the present case seek from this Court. Hence, this Court should grant review. In the alternative -- in the event this Court first grants the petition in *Pleasant Grove* -- this Court should hold the present case pending *Pleasant Grove*, and then grant the petition here, vacate the decision below, and remand for further proceedings in light of *Pleasant Grove*.

CONCLUSION

This Court should either grant the petition outright, or, in the alternative -- should this Court first grant the petition *in Pleasant Grove City v. Summum*,

No. 07-___ (U.S. petition for cert. filed Nov. 20, 2007) -- this Court should hold the present petition pending disposition of *Pleasant Grove* and then grant certiorari, vacate the decision below, and remand for further proceedings in light of *Pleasant Grove*.

Respectfully submitted,

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November 21, 2007